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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents,

BRIEF OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240

Attorney for Amicus Curiae, Washington Legal Foundation.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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THE INTERESTS OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 75,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to administrative and constitutional law. WLF seeks to advance the interests of all parties, including businesses, which seek to exercise their First Amendment rights.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are concerned primarily with the resolution of this law suit, not with the broader constitutional issues relating to a corporation's right to freedom of speech. Restrictions on the freedom of speech of any group or individual has a severely harmful effect on the functioning of a democratic political system.

The WLF is also concerned with the protection of commercial free speech under the First Amendment. Both business and consumers benefit by the free access to economic information which permits them to make rational decisions in our market economy. Even more importantly, the First Amendment protects speech commenting on economic affairs as well as speech discussing political and social issues.

We believe that it is clearly unconstitutional for a federal or state government agency to deny First Amendment rights to a corporation simply because of its corporate status. The continuing and unchecked aggregation of power by government agencies presents a dangerous threat to the existence of our constitutional freedoms.

ARGUMENT

I.

THE COMMISSION'S BAN ON THE USE OF BILL INSERTS BY THE UTILITY COMPANIES TO EXPRESS THEIR VIEWS ON "CONTROVERSIAL MATTERS OF PUBLIC POLICY" IS A CONTENT-BASED REGULATION, NOT A TIME, PLACE OR MANNER REGULATION AND THEREFORE IS SUBJECT TO A HIGH STANDARD OF REVIEW.

A. Content-based restrictions are those which limit the expression of a viewpoint by one party as opposed to content-neutral restrictions which limit speech only in certain forums or media.

The distinction between content-based restrictions and time, place and manner restrictions is best expressed by Professor Stone:

> Governmental restrictions of expression may be divided into two general categories – content-neutral restrictions and content-based restrictions. Content-neutral restrictions restrict communication without regard to the message conveyed . . . Content-based restrictions on the other hand, restrict communication because of the message conveyed.[1]

Obviously, not all decisions fall into these two categories and many rulings were decided on the basis of unique factual situations. As a general rule, however, content-based restrictions will be held invalid and time, place and manner restrictions (content-neutral) will be viewed by the Court with more favor.

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[1] Stone, *Restrictions on Speech Because of Content: The Peculiar Case of Subject Matter Restrictions,* 46 U. Chi. L. Rev. 81 (1978) (Footnote omitted).

Kovacs v. Cooper[2] is the best example of a strictly content-neutral restriction which bans all speech in a particular forum or media for legitimate reasons. The Supreme Court in *Kovacs* upheld an ordinance banning the use of sound trucks or any vehicle emitting loud and raucous noises within city limits. Similarly in *United States v. Breard*[3] the Court upheld an ordinance banning the distribution of commercial messages by door-to-door delivery. In *Martin v. City of Struthers*[4] however, the Court struck down an ordinance banning all door-to-door distribution of handbills, regardless of content. While the ban was content-neutral, the Court felt that it placed too great a restriction on the ability of certain groups to express their political and religious beliefs.[5]

The Court is rarely confronted with clear-cut examples of content-based or viewpoint-based, restrictions on speech. In one case, *Cohen v. California*[6], the defendant was found guilty of disturbing the peace in displaying an obscene slogan in public on his clothing. The Court struck down the defendant's conviction holding that the state statute restricted speech based on content (i.e. obscenity) and therefore abridged First Amendment rights. *First National Bank of Boston v. Bellotti*[7], discussed below, invalidated a state restriction on the right

[2] 336 U.S. 77 (1949).

[3] 341 U.S. 622 (1951).

[4] 319 U.S. 141 (1943).

[5] For another example of the imprecise standards necessarily used in the resolution of First Amendment cases, *compare Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) upholding a restriction as content-neutral *with Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975) which struck down a similar restriction.

[6] 403 U.S. 14 (1971).

[7] 435 U.S. 765 (1978).

of a corporation to spend money to influence a referendum since it silenced one viewpoint on a public issue without limiting others.

Police Department of Chicago v. Mosley[8] involved an ordinance prohibiting picketting outside public schools but exempted peaceful picketting in a labor dispute. The Court held this ordinance unconstitutional since it imposed a restriction on speech based on its content rather than, as would be legitimate its mode of expression. Compare *Grayned v. City of Rockford*[9], which upheld a similar statute prohibiting "the making of any noise or diversion which disturbs . . . the peace or good order of such school session . . ." since it was not overbroad and did not discriminate on the basis of the ideas expressed in the picketting.[10]

Many cases fall into a gray area between clearly unconstitutional viewpoint restrictions and innocuous time, place and manner restrictions. Two of these cases, heavily relied upon by the Commission in its brief, involve hybrid subject matter and forum restrictions. *Lehman v. City of Shaker Heights*[11] involved an ordinance forbidding political advertising (subject matter) on municipally operated mass transit (forum). *Greer v. Spock*[12] concerned a military regulation prohibiting political debate (subject matter) on any army training base (forum). Both restrictions were upheld by the Supreme Court due to the important governmental interest involved and the limited

[8] 408 U.S. 92 (1972).

[9] 408 U.S. 104 (1972).

[10] *Id.* at 108.

[11] 418 U.S. 298 (1974).

[12] 424 U.S. 828 (1976).

restriction imposed on freedom of expression. In *Lehman,* the Court recognized that the local government had a legitimate and overriding interest in not offending a captive audience and in avoiding the appearance of bias in allocating advertising space to political candidates.[13] The "historically unquestioned" authority of the military to operate its facilities in a manner necessary to provide for the common defense was held sufficient to sustain the restriction in *Greer.*[14]

B. The Commission's ban on bill inserts is closer to a content-based restruction than to a time, place and manner restruction and therefore constitutes a serious abridgement of a corporation's First Amendment rights.

The Public Service Commission professes to be concerned with protecting consumers from unwanted messages on emotional issues such as nuclear power. Yet there is no difference between the invasion of privacy caused by a utility bill insert and that of any other unsolicited piece of mail which the Commission has no authority to restrict. Since the Commission's ban will not be a content-neutral restriction on the use of a speech forum by all parties, this order cannot qualify as a time place and manner restriction.

The ban on utility bill inserts does however qualify as content oriented or viewpoint restriction on speech. Unlike the *Lehman* and *Greer* cases, the Commission's order does not ban all unsolicited postal communication regarding public issues. The Commission restricts only the views and opinions of public utilities while allowing other

[13] 418 U.S. at 304.

[14] 424 U.S. at 838-39.

participants in political debate unrestricted expression of their views. The Commission's ban is not a restriction on the time, place and manner of expression like *Kovacs*, nor a restriction on the subject matter of speech within a certain forum as was the case in *Lehman*. This case involves a limitation on the ability of one party to express his opinions and is analogous to the statutes struck down in *Cohen* and *Bellotti*. These kinds or restrictions are reviewed much more carefully by the Court and unless an overriding state interest is present they are generally held unconstitutional. But even when dealing with content-based regulations, it is necessary to balance the restriction on freedom of speech against the state interest protected by the regulation to reach a decision.

II.

THE COMMISSION'S BAN ABRIDGES EXPRESSION WHICH THE FIRST AMENDMENT WAS INTENDED TO PROTECT.

The Supreme Court, in three recent cases ruling on First Amendment rights, has recognized that the Constitution protects the right of society to benefit by public expression of ideas and information.[15] Political theorists addressing the issue of freedom of speech support this interpretation of the First Amendment and their views have been incorporated into several opinions.[16] Alexander Meiklejohn, the leading proponent of this position has stated:

> Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with infor-

[15] *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

[16] 435 U.S. at 777, n. 11; 425 U.S. at 765, n.19.

> mation or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* (emphasis in original)[17]

This view is also supported by Thomas Emerson in *Toward a General Theory of the First Amendment*[18] and John Milton in *Aeropagitica.*[19] The First Amendment is essential to the functioning of democracy since only by protecting the expression of all viewpoints can intelligent political debate and decisions be assured. The views and opinions of corporations have a valid place in public discussions of political issues.

In *First National Bank of Boston v. Bellotti,*[20] the Court recognized that the First Amendment protects primarily the expression of ideas rather than the rights of individuals to make their views known. As the Court said, "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protections."[21] Holding that the identity of the speaker was irrelevant, the Court said:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for

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[17] A. Meiklejohn, *Political Freedom* 27 (1960).

[18] T. Emerson, *The System of Freedom of Expression* 6-9 (1970).

[19] J. Milton, *Aeropagitica* (1644) Reprinted in *Aeropagitica and Other Prose Works* 1, 23-38 (1972).

[20] 435 U.S. 765 (1978).

[21] *Id.* at 778.

> the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.[22]

Like *Bellotti*, there is no reason in this case to suppress the views of petitioners simply because of their corporate status.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[23] the Court held that the First Amendment protected society's right to the free flow of commercial information. The Court also stated, "and if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[24] Similarly, in *Linmark Associates, Inc. v. Township of Willingboro,*[25] the Court struck down an ordinance restricting the right of realtors to provide notice of the sale of homes by posting signs, relying on *Virginia Pharmacy.*[26] And as was pointed out in *Bellotti,* cases upholding the right to freedom of the press "emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism and providing a forum for discussion and debate."[27]

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[22] *Id.* at 784.

[23] 425 U.S. 748 (1976).

[24] *Id.* at 765.

[25] 431 U.S. 85 (1977).

[26] *Id.* at 97.

[27] 435 U.S. at 781-83. *See also, Saxbe v. Washington Post Co.,* 417 U.S. 843, 863-64 (1974); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 389-90 (1969); *Mills v. Alabama,* 384 U.S. 214, 219 (1966); *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964).

These cases establish that the Supreme Court has not limited constitutionally protected expression on the basis of the source of the communication. Nor have limitations been imposed on the means of dissemination or distribution.[28] The Commission's order strikes at the very heart of the First Amendment by its restriction on the right of society to be informed about pressing public issues. The Washington Legal Foundation is not concerned so much with the harm done to the petitioner and other utilities as with the "mutilation of the thinking process of the community"[29] which is inevitable whenever government restricts freedom of speech.

The Supreme Court has applied the *Bellotti* rationale to any government action which limits the right of one individual or group to participate in public debate. Where some parties are prohibited from engaging in political debate then, a fortiori, certain viewpoints will not be expressed and the political system will suffer as a result. While *Police Department of Chicago v. Mosley*[30] is relevant here, more directly on point is *Madison School District v. Wisconsin Employment Relations Commission,*[31] which involved an order by the Wisconsin Employment Relations Commission requiring a school district to deny non-union teachers the right to participate in discussions in order to protect the union's exclusive bargaining right. The Court declared this order unconstitutional, stating, ". . . the participation in public discussion of public business cannot be confined to one category of interested

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[28] See, *Martin v. City of Struthers,* 318 U.S. 141, 143 (1943), *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1938).

[29] Meikeljohn, supra n.17.

[30] 408 U.S. 92 (1972).

[31] 429 U.S. 167 (1976).

[32] *Id.* at 175.

individuals"[32] The bill insert ban has the same effect by limiting the participation in public debate of one group, the utilities, without imposing limits on the expression of others. Such action is, in the words of Chief Justice Burger, "the antithesis of constitutional guarantees."[33]

III.
THE COMMISSION'S BAN DOES NOT FURTHER ANY SIGNIFICANT STATE INTEREST.

In its Statement of Policy on Advertising and Promotional Practices of Public Utilities,[34] the Commission based its ban primarily on the inserts' interference with ratepayer's privacy rights. Viewing the recipients of utility bills as a "captive audience,"[35] the Commission stated, "regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to arguments of the utility through its billing mechanism."[36] In adopting this position, however, the Commission impermissibly takes upon itself the power to decide which ideas and opinions the consumers of New York will be allowed to see. As the Court stated in *Bellotti,* "in the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak. . ."[37]

Courts have upheld restrictions on freedom of speech only where a substantial privacy interest was involved.[38]

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[33] *Id.* at 175-176.

[34] Appendix E. to Petitioner's Brief and Jurisdiction Statement.

[35] *Public Utilities Commission of the District of Columbia v. Pollak,* 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

[36] Appendix E at 43a.

[37] 435 U.S. at 784-85.

[38] *Cohen v. California,* 403 U.S. 15, 21 (1971).

The *Pollack* case, which gave birth to the captive audience doctrine, involved a plan of the Public Utilities Commission of the District of Columbia to subject riders of transit vehicles to special commercial radio programs. This proposal was upheld by the Court. Hostile picketting of an individual's home which interferes with his privacy rights may be restricted,[39] but only where the statute is properly drawn.[40]

These cases indicate the sorts of substantial privacy rights which the Court might protect under the captive audience doctrine or other theories. This state interest in the protection of privacy rights, however, does not apply to statements on public issues included with utility bills. The audience remains captive for only as long as it takes to discard the offending announcement. Such a minute intrusion on an individual's right to privacy will not support state action which abridges First Amendment freedoms. This position is supported by the fact that the mailbox is not considered a constitutionally protected enclave.[41] When the right to privacy is balanced against Consolidated Edison's First Amendment rights, as it must be,[42] the Commission's ban on bill inserts must be held unconstitutional.

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[39] *State v. Zanker*, 179 Minn. 355, 356-57, 229 N.W. 311, 312 (1930).

[40] *See, Gregory v. City of Chicago*, 394 U.S. 111, 125-26 (1969) (Black, J., concurring); *see also, Breard v. City of Alexandria* and *Martin v. City of Struthers*, supra, indicating that privacy rights may be superior to commercial expression but probably not to political and religious communication; *see generally*, Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw. U.L. Rev. 153 (1972).

[41] *Rowan v. United States Post Office Department*, 397 U.S. 728, 736-37 (1970).

[42] *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977).

The Commission did not base its order on any concern that the ratepayer was being forced to subsidize the utility's views by the inclusion of mailing costs in the expense base on which rates are charged.[43] In any case, respondent's attempt to raise this issue now is without merit. There is no dispute that the cost of the bill inserts will be borne by the stockholders of Consolidated Edison and not by consumers. The argument that petitioner in effect gets a "free ride" on the postage paid for by consumers is spurious since, as Judge Miner pointed out in his opinion, "it is conceded that the cost of mailing would be the same whether or not the inserts were included with the bills."[44] If this had concerned the Commission, the logical solution would have been to allocate part of the cost of the postage on bills to the stockholders rather than imposing an absolute ban on bill inserts.

The ban on bill inserts is especially serious since it effectively precludes communication of the utilities' viewpoint on public issues to consumers. Uncontradicted evidence in the case established that any other means of communication would be more costly and less effective thereby substantially curtailing the utilities' efforts to make known their position on matters of public interest. Since the New York Court of Appeals failed to take into account the unavailability of viable alternatives, its action is clearly contrary to constitutional precedent.[45]

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[43] *See, Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[44] *Consolidated Edison Company of New York, Inc. v. Public Service Commission*, 93 Misc.2d 313, 314, 402 N.Y.S.2d 551, 552 (1978).

[45] *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

CONCLUSION

The Public Service Commission's ban on utility bill inserts violates the First Amendment by prohibiting speech which the Constitution was meant to protect. The state's interest in protecting the privacy rights of its citizens does not, in this case, outweigh the abridgement of a constitutional right. The decision of the New York Court of Appeals should be overturned and the Commission's order with respect to bill inserts be declared null and void.

Respectfully submitted,

DANIEL J. POPEO
1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240
Attorney for Amicus Curiae,
*Washington Legal Foundation.**

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*Mr. Daniel Bensing, a third year student at the Georgetown University Law Center, also assisted in the preparation of this brief.